Petition

NO. 81-657

OCT 5 1981
ALEXANDER L. STEVAS,
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM H. FORMAN, JR.,
Petitioner

-versus-

CITY OF NEW ORLEANS, ET AL.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a lawyer on contract with a local independent governmental agency can have this contract terminated because he did not support the incumbent Mayor in his election campaign.

LIST OF PARTIES

1. Petitioner: William H. Forman, Jr. (Plaintiff-Appellant, below)
2. Respondents: the City of New Orleans, Ernest N. Morial, Anthony Mumphrey, Downtown Development District, Leon Irwin III, Dr. Alma H. Young, Robert G. Morgan, Joseph C. Canizaro, Laurence Eustis, Jr. Leon Godchaux III, Arthur L. Jung III, and Warren G. Moses (Defendants-Appellees, below).

R. James Kellogg

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

WILLIAM H. FORMAN, JR.,
Petitioner

-against-

THE CITY OF NEW ORLEANS, ET. AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI

The petitioner, William H. Forman, Jr., plaintiff-appellant below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on June 30, 1981, affirming the judgment of the United States District Court for the Eastern District of Louisiana entered on December 4, 1980.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana is not reported. The decision of the United States Court of Appeals for the Fifth Circuit is reported as *Forman v. City of New Orleans,* 651 F.2d 775 (5th Cir., 1981).

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals was rendered on June 30, 1981. A timely motion for rehearing and suggestion of rehearing *en banc* both were denied on August 18, 1981. Jurisdiction to review the judgment by Writ of Certiorari is conferred by 28 U.S.C. 1254.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

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42 U.S.C. 1983:

> Every person who, under color of any statute, ordinance regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Constitution of the United States, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Fourteenth Amendment:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana Revised Statute 23:961. See complete text included in Appendix, p. D-1.

Louisiana Revised Statute 33: 2740.3. See complete text included in Appendix, p. D-1.

STATEMENT OF THE CASE

Petitioner William H. Forman, Jr. is an attorney licensed to practice in the State of Louisiana. The Downtown Development District (hereinafter, "D.D.D."), respondent in this Court, is a special taxing district and local governmental subdivision located in the City of New Orleans and created by the Louisiana legislature. The purpose of the D.D.D. essentially is to provide services and capital improvements to the Central Business District of the City of New Orleans.

In 1977, Mr. Forman entered the private practice of law and signed a contract with the D.D.D. to provide legal services for the agency. Mr. Forman's contract was periodically renewed until late 1979 by letters of agreement setting forth the hourly fee he would be paid.

In mid-December, 1979, the D.D.D., acting through its Board of Commissioners at the direction of Respondents Mayor Ernest Morial and his executive assistant, Anthony Mumphrey, notified Mr. Forman that his contract would not be renewed. The Board instead hired William J. Guste, III, the son of the Attorney General of Louisiana and a long-time staunch supporter of Ernest Morial in several of his

campaigns for various offices. Mr. Forman alleged in his complaint and in his deposition that his contract was terminated because of his support of one of Mr. Morial's opponents for mayor. Defendants denied the allegation in their motion for summary judgment filed in the trial court, but argued that they were entitled to summary judgment because of the nature of the responsibilities exercised by Mr. Forman during the length of his contract with the D.D.D.

Summary judgment was issued by the district court, notwithstanding the presence of a dispute as to material facts--i.e., the reasons for the termination of Mr. Forman's contract. No written opinion was issued. The Fifth Circuit Court of Appeals summarily affirmed the trial court and a rehearing and suggestion of rehearing *en banc* were denied.

REASONS FOR GRANTING WRIT

I. The rulings of the District Court and the Court of Appeals for the Fifth Circuit are directly contrary to this Court's decisions in *Elrod v. Burns* and *Branti v. Finkel*

The Fifth Circuit, by summarily affirming the ruling of the District Court in favor of the defendants' motions for summary judgment, has adopted the reasoning of that Court. Although the District Judge

did not issue a written opinion, his analysis of the case at the hearing on the motion shows that he rejected the holdings of this Court in *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980). The rejection of *Elrod* and *Branti* by the District Court and the substitution of a "knew or should have known from the nature of the job" test necessitates action by this Court.

The case of *Elrod v. Burns*, supra, concerned the fate of non-civil service employees of the Cook County, Illinois sheriff's office. Those employees had been hired by a Republican sheriff and were either fired or threatened with discharge by his Democratic successor solely for the reason that they were not affiliated with or sponsored by the Democratic party. The majority of the United States Supreme Court ruled that the discharges were violative of the First and Fourteenth Amendments. A plurality opinion by Justice Brennan (joined by Justices White and Marshall) concluded that the patronage dismissals severely restricted political belief and association, but that those rights can be curtailed if the government proves interests of vital importance necessitate such a curtailment. The opinion held, however, that the curtailment must "further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit

gained must outweigh the loss of constitutionally protected rights." 427 U.S. 363. Justice Brennan found that no such showing had been made. Justices Stewart and Blackmun concurred in the judgment, but only on the narrow ground that non-policymaking, non-confidential government employees could not be discharged from jobs upon the sole ground of their political belief.

Justice Stewart's concurrence in *Elrod* led to some divergent opinions in the lower courts until the case of *Branti v. Finkel*, 445 U.S. 507, (1980). *Branti* involved two assistant public defenders in New York who had been appointed by a Republican public defender and were threatened with discharge solely because of their party affiliation. The Supreme Court held that the ultimate inquiry in cases of this type is "not whether the label 'policymaker' or 'confidential' fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518 The District Judge (and the Fifth Circuit) used an approach that looks *not* to whether political affiliation is an *appropriate* requirement for the effective performance of Mr. Forman's contract with the defendants, but instead to whether Mr. Forman knew that proper political affiliation was a

necessary prerequisite for keeping his contract. As was stated by the District Judge:

> When he took this job he knew that it had a kind of --or should have known, that it had a kind of political connexity or political aura about it that maybe had nothing to do with him and certainly, from everything that I have before me, had nothing to do with his competence. That's not even an issue here. Nobody says that Mr. Forman was anything but a satisfactory attorney for this D.D.D. What they said here was, 'Look, we don't owe him any more than he got,' and, besides that, when you get to this First Amendment protection, this was the kind of job and everybody essentially acknowledges that this was that kind of job, and now somebody else has got it. Not that the guy that is in there is a bad guy or Forman is out because he is, it's just that because of the political facts of life, so to speak. (Appendix, p. B-_13_).

> I don't have the exact same test [as the Supreme Court in *Elrod* and *Branti* in the sense that I am applying a more 'knew or should have known from the nature of the job' test and the test that is applied in the cases that you all diligently researched and cited to the Court, but I think that you get to the same bottom line and what I perceive the bottom line to be is this is the kind of job that requires a certain level of intelligence and ability and perceptiveness and perception to have, in a sense, put the individual on notice of the fact that there is something more than just the ability to hold and perform the job at risk here. . . (Appendix, p. B-__16__).

By focusing on whether Mr. Forman "knew or should have known from the nature of the job", both

the District Court and the Court of Appeals ignored the express teaching of *Branti* that the question is not merely the nature of the job, but rather whether political affiliation is an appropriate requirement for the effective performance of the public office involved. *If the reasoning of the District Court and the Court of Appeals in the instant case had been followed in Elrod* and *Branti*, those cases would have been decided against the individuals and in favor of the political patronage system. Certainly the deputy sheriffs in Elrod and the assistant public defenders in *Branti* "knew or should have known" that political connections were a requirement for keeping their jobs. That facile analysis begs the ultimate constitutional question under *Elrod* and *Branti* –i.e., whether the defendants proved below that such political connections are an *appropriate* requirement for effective performance in the position. There was no evidence that a person not closely alligned with the mayor of New Orleans could not effectively perform legal services for a supposedly politically independent governmental agency. The decision and reasoning of the District Court and the Court of Appeals totally undercuts *Branti* and creates a new test which leads to opposite results.

Furthermore, it is immaterial that Mr. Forman's contract did not provide him with a property interest (as argued by the defendants below, but

not conceded by plaintiffs). *Branti* quotes with approval a passage from *Perry v. Sinderman*, 408 U.S. 593(1972) which rejects the "right/benefit" analysis used by other courts. Even though a person may not have a "right" to a valuable government benefit and eventhough the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not rely upon a basis that infringes constitutionally protected interests--especially First Amendment interests. *Perry*, 408 U.S. 597-598, quoted with approval in *Branti*, 455 U.S. 514-515.

Justice Brennan in *Elrod* clearly saw that dismissing employees on a partisan basis is but one form of the general practice of political patronage which is repugnant to the Constitution. Other forms include "placing loyal supporters in government jobs that may or may not have been made available by political discharges" and "non officeholders may be the beneficiaries of lucrative governmental contracts", 427 U.S. at 353, both of which are present in the instant case. Mr. Forman's loss of his contract with the D.D.D. to someone having "better" political credentials than he had is constitutionally identical to Mr. Burn's loss of his job as a deputy sheriff and Mr. Finkel's loss of his position as an assistant public defendant. The Fifth Circuit decision affirming the

District Court's ruling is in direct contradiction to the last two situations. The District Court never reached the question of whether political affiliation with the Mayor was a requirement for the position--he simply ruled that it was a requirement that Mr. Forman "knew or should have known", not that the requirement was constitutionally acceptable.

It also bears noting that the D.D.D. is a body created by the laws of Louisiana to be independent of partisan politics. The Board of Commissioners of the D.D.D. is the governing body of the District, according to the organic statute and has independent taxing powers so that it is not forced to rely on the city administration for revenues. The District must independently contract with the City for certain services, and the District is empowered to hire its own staff. Even the power of the Mayor to appoint the nine members of the Board is not unfettered--the Board members have staggered terms such that a new mayor cannot immediately appoint a new board composed of his members and five members must be nominated by the Central Area Council of the Chamber of Commerce of the Greater New Orleans area. See generally LSA-R.S. 33: 2740.3, quoted in Appendix, p. D-2.

That the agency for which he worked is indepen-

dent of the Mayor certainly militates in favor of the conclusion that its attorney does not have a confidential or policymaking relationship with the Mayor. Therefore, under *Branti* and *Elrod*, there can be no demonstration that political connections with the Mayor is important for effective performance in the job. It also bears noting that the statutes of Louisiana specifically prohibit any employer from threatening to discharge or from discharging any employee because of the employee's political activities or associations. See LSA-R.S. 23: 961, quoted in Appendix, p. D-1. That statute specifically prohibits what was done in the case of Mr. Forman: discharge because of his political beliefs.

The instant case is in many respects identical to that of *McCormick v. Edwards*, 646 F. 2d 173 (5th Cir., 1981, now pending before this Court on petition for writ of certiorari, Docket No. 81-383. In that case, Mr. McCormick held a position as program director of the Capital District Law Enforcement Planning District and had actively supported a certain candidate for mayor of Baton Rouge, Louisiana. McCormick was terminated by his supervisor at the direction of the Governor for participating in political activities. Judge Ainsworth for the majority ruled that since state and federal governments can constitutionally discharge civil service employees for political activities, it would be anomoly to hold that a non-civil

servant serving at will could not be discharged for those activities. Judge Sam D. Johnson dissented on the grounds that there were no statutory or other regulatory prohibitions of political activities of employees such as McCormick and that the findings of fact of the trial judge were not clearly erroneous.

The instant case is constitutionally indistinguishable from that of *McCormick*. It is respectfully submitted that the decision of the Fifth Circuit in *McCormick* is wrong and that it shows a clear desire on the part of that Circuit to distinguish away on specious grounds the clear decisions of *Elrod* and *Branti*. The *McCormick* decision and that in the instant case have differing modes of analysis, but each is inconsistent with clear precedents of this Court. Unless certiorari is granted in the instant case, there will be three separate modes of analysis in "political patronage" cases. One mode is that of *Forman* --that if a person "knew or should have known from the nature of the job" that appropriate political connections were a necessary prerequisite to keeping his job, there is no violation of the First Amendment in firing him because he doesn't have those connections. The second mode of analysis is that of *McCormick*–that a political appointee can be discharged for participating in partisan politics. The third mode-- the correct one -- is that of *Branti* which

puts the burden on the appointing authority to show that political connections are an appropriate requirement for effective performance in the job.

CONCLUSION

The Fifth Circuit by its summary affirmance of the District Court's grant of summary judgment in favor of the defendants has ignored and directly contradicted clear precedents of this Court to the contrary. Certiorari should be granted to reaffirm this Court's holdings in *Branti v. Finkel* and *Elrod v. Burns*, settle the confused state of the law in this area and insure that those rulings will not be vitiated by the Courts of Appeals.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing petition for writ of certiorari have been served on opposing counsel in compliance with the rules of the Supreme Court of the United States, this 2nd day of OCTOBER 1981.

R. James Kellogg

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No.80-4013
Summary Calendar

DO NOT PUBLISH

WILLIAM H. FORMAN, JR.,
Plaintiff-Appellant,

versus

CITY OF NEW ORLEANS, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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(June 30, 1981)

Before AINSWORTH, GARZA and SAM D. JOHNSON, Circuit Judges.

PER CURIAM: AFFIRMED. See local rule 21.[1]

B-1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Filed illegible

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WILLIAM H. FORMAN, JR. CIVIL ACTION
VS. NO. 80-1654
CITY OF NEW ORLEANS, ET AL. SECTION "M"

*****

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Motions to Strike Jury and Summary Judgment
Wednesday, Dec. 3, 1980

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THE COURT: Let me save us a little bit of time. I've gotten the impression there isn't any real controversy about the kind of work that Mr. Forman was employed to do. It's fairly apparent from the types of memos that are a part of the record now and the general description of his duties, there is not any raging controversy as far as what his essential duties were with the district. It seems -- and this is what I really want you all to address -- that when you get that kind of a job which is one that does depend, to a certain extent, on professional skills, but one which never, nevertheless, is dependent, to some extent, on professional skills, is, at least pinged with some political acceptability, in terms of the fact that that employment may have to be cleared, so to speak, with political entities; that the person who comes aboard in those circumstances, that is, the existing circumstances of this particular kind of employment, and who comes with an annual, or semi-annual letter of commitment, so to speak, comes aboard with a sort of implied notification that this kind of job does have, at least, a quasi political connexity. That may be a strange use of those words, but there is something more than just ability that gets you the job in the first place, and something other than just ability, which may have to do with your not having the job at some point along the way. That doesn't necessarily have

anything to do with party affiliation or lack thereof of professional competence, or anything other than the day to day happenstance of partisan affiliations, insofar as city politics are concerned.

It seems to me that there is an awful lot of definitions in these Civil Rights contentions that don't exactly identify with local political situations that the Court has to be aware of and deal with in the context of this kind of law suit; in other words, this is those nice, neat definitions that are in the statute aren't exactly the real world, let's say, for example, New Orleans politics.

What I've got to have you all address for me, because this is where I need to be educated, is how much is that going to play in the context of this litigation; in other words, aren't we dealing here with a kind of knew or should have known, situation, insofar as taking that kind of job under those circumstances for this kind of agency where a written definition of term is concerned? Where is there any Civil Rights violation such that this Court should somehow become a forum for the resolution of what appears to this Court to be local quasi political. That's where I want you all to try to concentrate your discussion. I will let the movers go first and let you all respond. I don't mean to preempt anybody's argument on other points. I will hear you out on everything you think is material,

but that is where I am having my biggest trouble.

MR. SLATTERY: My name is Gerald Slattery, representing the Downtown Development District. One minor point I want to clear up is as I am sure you are aware, as of this writing the City has now joined the motion for summary judgment and adopted the arguments and memorandum. The two points you focused on when you asked us to consider them in our oral arguments are broken down very neatly as to what Mr. Forman's theories of recovery are. He alleges in paragraph 18 through 20 of his complaint that he has a property interest in his job, which was denied under color of state law, a right of equacy contract and contract under Louisiana law and set aside, a third right of recovery, based on the notion that the election by the DDD not to renew his contract violated his rights of association and political affiliation under the First Amendment.

The points you focused on are basically easily categorized in those terms. The fact that he had his association with the DDD under a series of letters of agreement, all of which very specifically delineated his hourly fee and the date of the termination of the agreement, he had a property interest in his job.

What the Court basically requires there is that

this claim of property right in the job, some justifiable expectation of continued employment has to be based upon a contract right, whether express or implied. In those circumstances where the person has a contract which says in black and white you are hired at an X salary or X number of dollars per hour until this date, that's what he contracted for, that is what he gets.

THE COURT: Let me interrupt you and ask you this: What are those Courts talking about when they say, based on a contract? Are they talking about a contract that has kind of an indefinite term? In other words, if there is any validity to this business about a contract right, then it seems to me the only, only if your argument is correct then the only time that a contract right can be existent is where you have a contract for an indefinite term.

MR. SLATTERY: If that is so, you may have an implied contract with a term during good performance that is not uncommon in some instances.

THE COURT: What you are saying, once it has a cutoff date, it doesn't fall into the category of those kinds of cases, because now it is a categoric end and there is no new implied beginning, there is only a real beginning or not.

MR. SLATTERY: You get what you bargain for. The Supreme Court said in *Rock*, the important fact in this case, they meaning the contracts, that the professor has specifically provided that the respondent's employment was terminated on June 30. They did not provide contract renewals. They made no provisions of renewal whatsoever. That's the case here. I don't think it can be really open to question. The plaintiff didn't even contest this in his memorandum, that there is no property right in this job. That doesn't--that's not what he is basing his case on, I think we all know that. Even if you were to find that he did not have a property interest in his job, I think he doesn't, he claims that he is still within that class of persons protected by the *Elrod, Bronte* rule. That is the second point you talked about just a moment ago. The words quasi political, I think, are words that have to be spoken, have to be addressed here.

What the Court in *Bronte* and in *Elrod* was groping for, *Elrod* was the first step. The Court in *Bronte* said that the District Court found things too easy. They could, say policy making, in this box, you go over here, you go over here. That is not what they intended. I think the fact that Justice Brennan joined Justice Stephens indicates that. *Elrod* wasn't overruled. They talked about it in some length. What we are groping for, they are not groping, they laid down a princple, it's up to the District Judges to decide where

the cases fall.

The two elements that they require that you look at, this hasn't changed from *Elrod*, is that you examine the nature of the job duties that the person performs. That is most important. You also examine the sort of function that the hiring authority has, where it fits into the big scheme of things.

We outline in some detail what Mr. Forman does. He is a counsellor-advisor. He is an attorney. He has a lawyer-client relationship with the hiring authority. He attended the executive and regular meetings of the Board, drafted the Board's by-laws, drafted amendments to the District, the contracts, the plans are very, very detailed, which had to be submitted to the City Planning Commission and thence to the City Council for approval. He participated in that. He was an integral working part in it, a member of the Board of Commissioners. He was an intregral working part of the Board. Upon his expertise and the trust and confidence they had in him, depended the success or failure of the Board's plans for services and capital improvements.

The District itself, and the statutes, it's very clear that they are really close to the City's executive branch and legislative branch. They can not raise or spend a nickel unless it is approved in detail by the

City Planning Commission and the City Council.

THE COURT: Let me ask you a question about these duties as it has to do with this law suit. Suppose I were to conclude on a summary basis, that there is no indication whatsoever here of any lack of professional competence or any lack of competence on the part of the DDD as it has to do with Mr. Forman's professional expertise, but only that Mr. Forman, whose abilities in relationship to the DDD is spotless, but nevertheless doesn't have the political clout to keep his job, not because of any failure on his part, but because of somebody who has more reason to get that job through DDD via other political forces, whatever they may be, and thus gets replaced.

Solely on that basis, what is your position with respect to the law as it would apply to that circumstance?

MR. SLATTERY: That's the plaintiff's case, that is what he said happened. Our statement of uncontested material facts said nothing whatever about his competence. We haven't put that in issue at all. We haven't put in issue the fact, although we made it clear we do deny it, his dismissal was not politically motivated.

attorney-client relationship between the plaintiff and the defendant. There has never been a case where someone ordered reinstated by the *Elrod, Bronte* rule where the hiring authority was a client and elected not to continue employing his own attorney. That's the case you have here. You don't have to draw the line.

THE COURT: I see where you are coming from, and I have a lot of respect for it. I've go to tell you all I am really up in the air about this thing, but though it's not the case we have here, there is also no contention here of any failure of that attorney-client relationship as being the cause of the discharge, or the nonrehiring, I should say. There isn't a discharge, there simply is not a renewal. Maybe that's a very important difference. I don't know.

MR. SLATTERY: The point is, what are the sort of job duties which will except a person from the protection of the rule; what is the Supreme Court talking about.

THE COURT: You are right: when you apply it to this case, it does seem that it is in that category.

MR. KELLOGG: I don't want my failure to respond to the City's joining in the motion for summary judgment interpreted in my waiver to object to that, since they adopted basically the arguments of defend-

What I am saying is that the Court, the Supreme Court drafted a definition in *Elrod* , of the persons to whom the rule does not apply. In *Bronte* it's a restatement of the issue. It's not a new test. It's a restatement of the issue.

The plaintiff's case is based upon the paragraph, that says that the ultimate inquiry is the question whether the higher authorities can appropriate requirements for the executive performance of the public office involved.

THE COURT: I read that last night, I bet ten times, to make some sense out of it as it has to do with the litigation. With all due respect to the author of that, particularly with somebody that has been on the political scene a little bit, you take that, it doesn't fit in terms of what I am supposed to decide here, that's not helping or hurting, that is an observation.

MR. SLATTERY; It puts the question, a pure statement of the issue, you have to look closely at *Bronte* to see how they answer that issue. What do you look at to resolve that. You start with the idea that this rule is not a blanket prohibition. The Court has, in two cases, made clear this does not apply in every case, and it does not apply to every person. This particular case presents a case where there is an

ants. I wanted to make that clear.

THE COURT: This thing is too important for us to be messing around with procedural things. I think we should get to the basic issue. I'd rather have you spend your time addressing this along the lines we are discussing. There may be something you want to say to me outside of that.

MR. KELLOGG: No, sir; I wanted to make it clear on the record that the summary judgment should not be granted on the City because no written opposition had been filed.

Your Honor, it is clear that Mr. Forman's contract could have been the--the DDD could have decided not to renew his contract on any number of bases, none of those are before us. The only issue that has to be assumed for purposes of the present motion is that the only reason that he was not--his contract was not renewed was because of his political affiliation and lack thereof for political First Amendment protected reasons. The question quite clearly then, under the cases quoted in *Bronto,* is that it doesn't matter whether you have a property interest there or not. A person can be terminated for any number of reasons. It's absolutely clear he can not be terminated for reasons that are protected by the First Amendment. I

think that puts that whole, whether or not he has a recognizable property interest to one side.

THE COURT: You see the problem as I see it. There is really a narrowing down here. The thing that I am worrying about is the situation, all these First Amendment cases contemplate some clearcut Republican, Democrat, the ins and outs, the goods and bads, the liberals and conservatives, and at the very most you have none of that. At the very most you have more clout, less clout; more friends of the Mayor's and less friends of the Mayor's; more, possibly a phone call from Mr. So-and-so in someone else's behalf than in Mr. Forman's behalf. The only thing that I see being addressed here that comes anywhere near the so-called First Amendment guarantees is the situation which somebody had, politically you might say, more of an inside track than Forman had, not that Forman is a bad guy, not that Forman ever defaulted in any professional or personal or in any respect whatsoever, not that Forman was in any way unable to or reluctant to perform his full duties, but only that once Forman's deal ended in the specific, chronological terms, that it was confected, that somebody with more clout got the job than Forman. That's really where we are here.

MR. KELLOGG: More political clout and different affiliations.

THE COURT: Maybe not even different affiliations. As I perceive your cause of action, if, indeed, it exists, it has to be on that narrow contention, my question is whether that really is a First Amendment right, whether any First Amendment rights exist there or is it more in the category of the old story that I am going to tell you, and this kind of off the record, except that it seems to me more close to this situation.

You have heard about the fellow who was driving along the highway who saw a snake going across the highway, and it had been struck by a car and it was in terrible shape and he stopped and picked it up and brought it home and nursed it back to health, and finally after all of this one day the snake bit him and he said, "How could you do this to me after I did all these things for you?" and the snake said,"You knew I was a snake when you picked me up."

It's the same thing here. When he took this job, he knew that it had a kind of – or should have known, that it had a kind of political connexity or political aura about it that maybe had nothing to do with him and certainly, from everything that I have before me, had nothing to do with his competence. That's not even at issue here. Nobody says that Mr. Forman was anything but a satisfactory attorney for this DDD. What they said here was, Look, we don't owe him any more than he got, and besides that, when you get to

this First Amendment protection, this was that kind of job and everybody essentially acknowledges that this was that kind of job, and now somebody else has got it. Not that the guy that is in there is a bad guy or Forman is out because he is, it's just because of the political facts of life, so to speak, and I must tell you that I am very hesitant to bring the U.S. District Court into that arena. That is what you've got to address.

MR. KELLOGG: I understand that. If this was 1975 before *Elrod*, we wouldn't have a leg to stand on. It's also quite clear that the elevator operator in Cook County, had no more of an expectancy that his job was going to be continued.

THE COURT: To me, that is more where the guidelines came. We are not going to let some poor guy that is an elevator operator get clobbered by this kind of process, but we are going to let people in a more professional area who either know or should know that there is some political overtone that has to do with their position that they may be at risk. What they tried to do then was they tried to define it in some kind of way that made some kind of a legal sense. Nobody wants to demean an elevator operator or elevate an attorney, but what they try to do, as I read that last night, was they tried to perceive some kind of a delineation that said without really saying it.

They said look here, if some guy who is making six hundred bucks a month, has a wife and three kids and all of a sudden, zap, he is going to lose his job as a non-skilled elevator operator because of some political reason that he doesn't have any control over except he went down and registered a certain way or something like that. They said we've got to protect him, we've got to envelope him in some way, whereas some gu that is getting a substantial amount of money and is a more professional type, who is by the very nature of what he is doing, attuned more to the political processes at work that had to do with the selection of him in the first place, he can take care of himself, he kind of senses that he got that job because of a political or quasi political connexity, and because of that he's more able to realize that when there is some change in the political atmosphere and his time has run out, that he may not be renewed. That's what I think they are trying to say.

I am as prepared as I think I am ever going to be to rule on it. It may be easier on everybody to take it under advisement and hand down on it, but I have to tell you all that I really have agonized over this, because my whole political life, though not very long, was one in which I felt that there were some things that happened that ought not to happen in terms of job awarding and contracts and city employment, and

I really do have a sympathetic feeling to the frustration which must be visited on a highly competent, perfectly able individual such as the plaintiff in this case, but I am bound to the view that this kind of job, in the context that existed and indicated by the record, it does fall into what I think is essentially the definition that permits the hiring entity not to rehire own findings, on whatever grounds they ultimately perceive to be the basis for not his discharge, but simply for his nonrehiring.

I believe that Mr. Forman, for whom everyone seems to have regard and certainly understandably so, nevertheless is in that category where his discharge, or his nonrehiring is beyond the ambit of relief that this Court can grant, and I do not find the careful reading of plaintiff's petition forms a basis upon which this Court can proceed to grant relief, as I consider all that is before me on the motion for summary judgment. It is a matter that needs be more clearly defined, and it may very well be that my effort to try to apply the law to what I perceive to be a totally noncontroverted factual situation here, has resulted in error, but I do believe that he is in that category of job that the case law seems to me to be excepting from the ambit of protection that this Court would have the ability to grant.

I don't have the exact same test in the sense

that I am applying more knew or should have known from the nature of the job test and the test that is applied in the cases that you all have both diligently researched and cited to the Court, but I think that you get to the same bottom line and what I perceive the bottom line to be is this is the kind of job that requires a certain level of intelligence and ability and perceptiveness and perception to have, in a sense, put the individual on notice of the fact that there is something more than just the ability to hold and perform the job at risk here, as opposed to the elevator operator, whether he be Republican or Democrat, liberal or conservative, Mayor's friend or non-Mayor's friend, can still do all of the motions of raising the elevator. Where it gets into this kind of job, in this kind of a context, for this kind of agency, in the existing circumstances of this particular hiring, under this particular determination or nonhiring at the end of a term, I think the Federal Court is not the forum in which to air the grievance.

For that reason, I am going to grant the motion for summary judgment and find moot the motion to strike the jury demand.

MR. KELLOGG: One question for the record purposes. Are you finding summary judgment on the exact same basis to the City defendants?

THE COURT: Yes; I will permit, in view of my remarks that we have had with respect to the matter, I would reserve ruling on that, if I felt that there was any possible differentiation to be made, but I don't think there is, and in view of that conclusion, I would let you address it if I thought there was some clear cut mark of differentiation there. I honestly don't perceive there is any slightest bit of difference there between defendants. I am finding that the motion should be granted in both respect to the Downtown Development District, the D.A., the City and the Mayor, and actually, in a way, it may be in your interest because it forms a very specific basis for an appeal.

(Whereupon the hearing on motions was concluded.)

*****

CERTIFICATE

I hereby certify that I am a duly appointed, certified, official court reporter of the United States District Court for the Eastern District of Louisiana.

I further certify that the foregoing, pages 1 to 18, is a true and correct transcript of the proceedings had in the above entitled cause and that said

transcript is a true and correct transcription of my stenographic notes.

Dated at New Orleans, Louisiana this 9th day of February, 1981.

/S/ Rhonda J. Ballard

Rhonda Ballard, CSR
Official Reporter
U.S. District Court
Section "M"

C-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

NO. 80-4013

Filed Aug. 18, 1981

WILLIAM H. FORMAN, JR.,
Plaintiff-Appellant,

versus

CITY OF NEW ORLEANS, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 30, 1981, 5 Cir., 1981, _____F.2d_____).

(August 18, 1981)

Before AINSWORTH, GARZA and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of of said judges not having voed in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in ac-

tive service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/S/ Illegible

United States Circuit Judge

L.S.A.-R.S. Title 23:

§961. Political rights and freedom; restrictions forbidden; penalty; employees' right to recover damages

Except as otherwise provided in R.S. 23:962, no employer having regularly in his employ twenty or more employees shall make, adopt, or enforce any rule, regulation or policy forbidding or preventing any of his employees from engaging or participating in politics, or from becoming a candidate for public office. No such employer shall adopt or enforce any rule, regulation, or policy which will control, direct, or tend to control or direct the political activities or affiliations of his employees, nor coerce or influence, or attempt to coerce or influence any of his employees by means of threats of discharge or of loss of employment in case such employees should support or become affiliated with any particular political faction or organization, or participate in political activities of any nature or character.

Any indivudual person violating the provisions of this Section shall be fined not less than one hundred dollars nor more than one thousand dollars, or imprissoned for not more than six months, or both; and any firm, corporation or association violating the provisions of this Section shall be fined not less than five

hundred dollars nor more than two thousand dollars.

Nothing herein contained shall in any way be construed to prevent the injured employee from recovering damages from the employer as a result of suffering caused by the employer's violations of this Section.

L.S.A. R.S. 33:
§2740.3. The Downtown Development District of the city of New Orleans; creation, composition and powers; preparation of plans; levy of ad valoren taxes and issuance of bonds

A. There shall be, and there hereby is, created a special taxing district within the city of New Orleans comprised of all the territory within the following prescribed boundaries:

The point of begining shall be at the intersection of the east bank of the Mississippi River and the Mississippi River Bridge approaches and Pontchartrain Expressway: thence continuing along the upper line of the Pontchartrain Expressway right-of-way less and except ramp areas, and in a northwesterly direction to the lake side right-of-way line of Claiborne Avenue; thence northeasterly along the lake side of said right-of-way line of Claiborne Avenue to the lower right-of-way line of Iberville Street; thence along the said lower right-of-way line of Iberville Street to the east bank of the Mississippi River; thence continuing

along the east bank of said river to the upper right-of-way of the Mississippi River Bridge approaches and Pontchartrain Expressway, being the point of beginning.

The said special taxing district shall be known as, and is hereby designated The Downtown Development District of the City of New Orleans hereinafter in this Section referred to as the district, said creation to be effective Januray 1, 1975.

B. The Council of the city of New Orleans, or its successor exercising the legislative powers of said city hereinafter referred to, collectively, as the "city council," shall have such power and control over, and responsibility for, the functions, affairs and administration of the district as are prescribed.

C. In order to provide for the orderly planning, development, acquisition, construction and effectuation of the services, improvements and facilities to be furnished by the district, and to provide for the representation in the affairs of the district of those persons and interests immediately concerned with and affected by the purposes and development of the district, there is hereby created a board of commissioners for the district hereinafter referred to as the "board".

D. The board shall be composed of nine members at least seven of whom shall be qualified voters of the city of New Orleans, and such members shall possess such additional qualifications and shall be appointed as follows:

(1) All members shall be appointed by the mayor with the approval of the city council, provided, however, that the mayor will select five of such members from a list of eight nominees named by the central area council of the chamber of commerce of the New Orleans area, or its successor.

(2) The members of the board initially appointed shall be appointed as follows: two members for one year each, two members for two years each, two members for three years each, two members for four years each and one member for five years, the length of the term for each individual appointed to be determined by lot. They shall serve until their successors have been appointed and qualified. The members of the board thereafter appointed upon the expiration of the respective terms of the initial appointees shall be selected and appointed in accordance with the procedures herein prescribed for the selection and appointment of the original members for the term of five years. Any vacancy which occurs prior to the expiration of the term for which a member of the board has

been appointed shall be filled by appointment in the same manner as the original appointment for the unexpired term.

(3) As soon as practicable after their appointment, the board shall meet and elect from their number a chairman, a vice chairman, a treasurer, and such other officers as it may deem appropriate. A secretary of the board may be selected from among the members or may be otherwise selected or employed by the board. The duties of the said officers shall be fixed bybylaws adopted by the board. The board shall adopt such rules and regulations as it deems necessary or advisable for conducting its business and affairs, and shall engage such assistants and employees as is needed to assist the board in the performance of its duties. It shall hold regular meetings as shall be provided by its bylaws and may hold special meetings at such time and places within or without the districts as may be prescribed in its rules or regulations. A majority of the members of the board shall constitute a quorum for the transaction of business. The board shall keep minutes of all regular and special meetings and shall make them available to the public in conformance with law. The members of the board shall serve without compensation; however, they shall receive travel allowance as reimbursement for expenses incurred while attendingto the business of the district.

E. (1) The board shall prepare, or cause to be prepared a plan or plans (such plan or plans, and the plan provided for in Subsection F of this Section, being hereinafter referred to, collectively, as the plan) specifying the public improvements, facilities and services proposed to be furnished, constructed or acquired for the district, and it shall conduct such public hearings, publish the exercise of its sound discretion may deem to be appropriate or advisable and in the public interest.

(2) Any plan may specify and encompass any public services, capital improvements and facilities which the city of New Orleans is authorized to undertake, furnish or provide under the constitution and laws of the state of Louisiana, and such specified public services, improvements and facilities shall be, and shall for all purposes be deemed to be, special and in addition to all services, improvements and facilities which the city of New Orleans is then furnishing or providing, or may then, or in the future, be obligated to furnish or provide with respect to persons or property within the boundaries of the district.

(3) Any plan shall include (a) and estimate of the annual and aggregate cost of acquiring, constructing or providing the services, improvements or facilities set forth therein: (b) the proportion of the tax to be

levied on the taxable real property within the district which is to be set aside and dedicated to paying the cost of furnishing specified services, and the proportion of such tax to be set aside and dedicated to paying the cost of capital improvements, or paying the cost of debt service on any bonds to be issued to pay the cost of capital improvements, such proportions, in each case, to be expressed in numbers of mills; and (c) an estimate of the aggregate number of mills required to be levied in each year on the taxable real property within the district in order to provide the funds required for the implementation or effectuation of the plan for furnishing the services specified and for capital improvements or debt service, or both.

(4) The board shall also submit the plan to the planning commission of the city of New Orleans. Said planning commission shall review and consider the plan in order to determine whether or not it is consistent with the comprehensive plan for the city of New Orleans, and shall within thirty days following receipt thereof submit to the city council its written opinion as to whether or not the plan or any portion or detail thereof is inconsistent with the comprehensive plan for the city, together with its written comments and recommendations with respect thereto.

(5) After receipt of the plan together with the written comments and recommendations of the city plan-

ning commission, the city council shall review and consider the plan, together with such written comments and recommendations. The city council may by a majority vote of its members adopt or reject the plan as originally submitted by the board, or it may alter or modify the plan or any portion or detail thereof, but only by a majority vote of all of its members. If the plan as originally submitted by the board is adopted by the majority vote of the city council, it shall become final and conclusive and may thereafter be implemented. If, however, the city council alters or modifies the plan by a majority vote of its members, the plan as so altered or modified shall be resubmitted to the board for its concurrence or rejection. The board may concur in such modified plan by a majority vote of all of its members. If the board so votes to concur in the plan as modified by the city council, the plan shall become final and conclusive and may thereafter be implemented. If, however, the board does not concur in the plan as modified by the city council, it shall notify the city council in writing of its action. Thereafter, and as often and at such time or times as the board may deem to be necessary or advisable, it shall prepare, or cause to be prepared, a plan or plans and submit the same to the city planning commission in accordance with the same procedure hereinabove prescribed with respect to the original plan. The city planning commission shall, in turn,

submit such plan, for its adoption, modification or rejection in the same manner and with the same effect as hereinabove provided with respect to the original plan.

F. The provisions of Subsection E of this Section to the contrary notwithstanding, the board may prepare and submit directly to the city council a plan or plans setting forth its intention to employ professional consultants and experts and such other advisors and personnel as it in its discretion shall deem to be necessary or convenient to assist it in the preparation of a plan or plans for the orderly and efficient development of services and improvements within the district. Such plan shall also specify the services proposed to be rendered by such employees, an estimate of the aggregate of the proposed salaries of such employees and an estimate of the other expenses of the board required for the preparation of such plan or plans, together with a request that a tax, within the limits hereinafter in this Section prescribed, in an amount sufficient to cover the costs of such salaries and expenses be levied on the real property within the district. The city council shall review and consider such plan within thirty days following the submission to it by the board, and shall adopt or reject such plan by a majority vote of its members. If the city council adopts such plan, it shall become final and conclusive and the tax shall be levied as hereinafter provided. If

the city council rejects the plan, it shall notify the board of its action, and the board may again and from time to time prepare and submit to the city council for its review, consideration, adoption or rejection in accordance with the procedures provided for in this Paragraph, a plan setting forth the matters hereinabove in the Section prescribed.

G. If no plan is finally and conclusively adopted in accordance with the procedures prescribed in this Section within ten years from and after January 1, 1975, all power and authority conferred hereby shall lapse, the district shall be dissolved and all power and authority incident thereto shall become null and void as a matter of law; provided that, in such event, all obligations, contractual or otherwise, incurred by the district during its existence shall survive and shall be fully enforceable in accordance with their terms.

H. All services to be furnished within the district pursuant to any plan finally and conclusively adopted hereunder, shall be furnished, supplied and administered by the city of New Orleans through its regularly constituted departments, agencies, boards, commissions and instrumentalities as appropriate in the circumstances; and all capital improvements and facilities to be acquired, constructed or provided within the district, whether from the proceeds of bonds or otherwise, shall likewise be so acquired, con-

structed or provided by the city of New Orleans through its regularly constituted departments, agencies, boards, commissions and instrumentalities as appropriate in the circumstances, it being the intention hereof to avoid absolutely the duplication of administrative and management efforts and expense in the implementation of any plan adopted for the benefit of the district. In order to provide such services and/or provide, construct or acquire such capital improvements or facilities the board may enter into contracts with the city of New Orleans. The cost of any such services, capital improvements and facilities shall be paid for to the city of New Orleans from the proceeds of the special tax levied upon real property within the district as herein provided, or from the proceeds of bonds, as the case may be.

1. The city council, in addition to all other taxes which it is now or hereafter may be authorized by law to levy and collect, is hereby authorized to levy and collect as hereinafter specifically provided for a term not to exceed fifty years from and after the date the first tax is levied pursuant to the provisions of this Section, in the same manner and at the same time as all other ad valorem taxes on property subject to taxation by the city are levied and collected, a special ad valorem tax upon all taxable real property situated within the boundaries of the core area development district. The number of mills hereby authorized shall be computed

by dividing the number of mills levied and collected by the city of New Orleans for general operating purposes for the year 1977 into the number of mills levied and collected by the city of New Orleans for general operating purposes for the year 1978 and multiplying the result by ten. No such tax shall be levied until a plan requiring or requesting the levy of a tax is finally and conclusively adopted in accordance with the procedures prescribed in this Section. The proceeds of said tax shall be used solely and exclusively for the purposes and benefit of the district. Said proceeds shall be paid over to the Board of Liquidation, City Debt, day by day as the same are collected and received by the appropriate officials of the city of New Orleans and maintained in a separate account. Said tax proceeds shall be paid out by the Board of Liquidation, City Debt, solely for the purposes herein provided upon warrants or drafts drawn on said Board of Liquidation, City Debt, by the appropriate officials of the city and the treasurer of the district.

J. (1) The city of New Orleans, when requested by resolution adopted by the vote of a majority of the members of the board, approved by a resolution of the city council adopted by a majority vote of its members, and by resolution adopted by the vote of a majority of the members of the Board of Liquidation, City Debt, shall have power and is hereby authorized

to incur indebtedness for and on behalf and for the sole and exclusive benefit of the district, and to issue at one time, or from time to time, negotiable bonds, notes and other evidences of indebtedness herein referred to collectively as bonds of the city of New Orleans, the principal of, premium if any, and interest on which shall be payable solely from the proceeds of the special tax authorized, levied and collected pursuant to the provisions of this section for the purpose of paying the cost of acquiring and constructing capital improvements and facilities within the district. Such bonds shall not constitute general obligations of the city of New Orleans, nor shall any property situated within the city other than property situated within the boundaries of the district be subject to taxation for the payment of the principal of, premium, if any, and interest on such bonds. Futhermore, any indebtedness incurred by the city of New Orleans for and on behalf and for the benefit of the district pursuant to the provisions of this Section, whether evidenced by bonds, notes or other evidences of indebtedness, or otherwise, shall be excluded in determining the power of the city of New Orleans to incur indebtedness and to issue its general obligation bonds. The principal amount of such bonds which may be outstanding and unpaid at any one time shall never exceed the sum of fifty million (50,000,000) dollars. The proceeds derived from the sale of all such bonds shall be paid over to the appropriate officials of

the city of New Orleans and shall be disbursed solely for the purposes and benefit of the district. All such bonds shall be sold by the Board of liquidation, City Debt, and shall bear such rate or rates of interest, and shall, except as herein otherwise specifically provided, be in such form, terms and denominations, be redeemable at such time or times at such price of or prices, and payable at such times and places, within a period of not exceeding fifty years from the date thereof, as the Board of Liquidation, City Debt, shall determine.

(2) Said bonds shall be signed by the mayor of the city of New Orleans and the director of finance of the city of New Orleans, or officers exercising a similar function, and countersigned by the president or vice president and the secretary or assistant secretary of the Board of Liquidation, City Debt, all but one of said signatures may be in facsimile, and the coupons attached to said bonds shall bear the facsimile signatures of said director of finance and said secretary or assistant secretary. In case any such officer whose signature or countersignature appears upon such a bond or coupon shall cease to be such officer before delivery of said bonds or coupons to the purchaser, such signature or countersignature shall nevertheless be valid for all purposes. The cost and expense of preparing and selling said bonds shall be paid from the proceeds thereof.

(3) The resolution of the Board of Liquidation, City Debt, authorizing the issuance and sale of such bonds and fixing the form and details thereof, may contain such other provisions, not inconsistent nor in conflict with the provisions of this Section, as it may deem to be necessary or advisable to enhance the marketability and acceptability thereof by purchasers and investors, including, but without limiting the generality of the foregoing, covenants with bondholders setting forth (a) conditions and limitations on the issuance of additional bonds constituting a lien and charge on the special tax levied on real property within the district pari passu with bonds theretofore issued and outstanding and (b) the creation of reserves for the payment of the principal of and interest on such bonds. These bonds and the interest thereon are exempt from all taxation levied for state, parish or municipal or other local purposes; and savings banks, tutors of minors, curators of interdicts, trustees and other fiduciaries are authorized to invest the funds in their hands in said bonds.

(4) the Board of Liquidation, City Debt, as now organized and created, and with the powers, duties and functions prescribed by existing laws, shall be continued so long as any bonds authorized by this Section are outstanding and unpaid.

K. Notwithstanding any other provision of this Section to the contrary, no tax authorized herein shall be levied and no bonds shall be issued unless and until the maximum amount of the tax and the maximum amount of the bonds has been approved by a majority of the electors voting thereon in the city of New Orleans in an election called for that purpose. No bonds issued pursuant to this Section shall be general obligations of the state of Louisiana, the parish of Orleans or the city of New Orleans.

L. The district shall have the power to acquire, to lease, to insure and to sell real property within its boundaries in accordance with its plans.

M. The district shall have the power to advance to the city of New Orleans funds for payment for services rendered by the city pursuant to a contract or contracts between the district and the city.

Opposition

NO. 81-657

Office - Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM H. FORMAN, JR.

Petitioner

VERSUS

CITY OF NEW ORLEANS, ET AL.

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Of Counsel:
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QUESTIONS PRESENTED FOR REVIEW

I. Did the decision by the Downtown Development District not to renew petitioner's contract for legal services for the year 1980 amount to a discharge solely because of his political beliefs or party affiliation within the meaning of *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980), and *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976)?

II. Even if petitioner were not rehired because of his political beliefs or party affiliation, is he within the class of persons protected by the Supreme Court's ruling proscribing patronage dismissals?

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NO. 81-657

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM H. FORMAN, JR.

Petitioner

versus

CITY OF NEW ORLEANS, *ET AL.*

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Downtown Development District (the "District"), a statutorily-created special taxing district of the City of New Orleans, was established to provide services and capital improvements to that area of downtown New Orleans popularly known as the central business district. The enabling legislation, La. Rev. Stat. 33:2740.3 (1974), [1] outlines the purpose for which the District was established and sets forth the procedures

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1 Appendix A.

its Board of Commissioners must follow in carrying out its mandate. Under this legislation, the Board must work very closely with the executive and legislative branches of city government to implement its annual plans for providing these services and capital improvements.

Until February 1, 1980, petitioner Forman was engaged by the District as a legal adviser pursuant to La. Rev. Stat. 33: 2740.3(F) (1974), which authorizes the District's Board of Commissioners

> "to employ professional consultants and experts and such other advisors and personnel as it in its discretion shall deem to be necessary or convenient to assist it in the preparation of the plan or plans for the orderly and efficient development of services and of improvements within the District."

Id.

The legal services that petitioner Forman provided to the Board were set forth to the district court in the affidavit of R. Thomas Cucullu, Jr., former Executive Director of the District. [2] Petitioner Forman does not dispute that this affidavit fairly represents the nature of the legal services that he provided to the Board, and also does not dispute that the Board fully complied with all of its obligations to him under each of the legal services contracts it entered into with him.

Each of these legal services contracts was for a fixed term: some were for a period of six months, and some for a year. At the end of each term, the Board would vote on whether to renew the contract and for how long. The Executive Director of the District would then execute the contract on behalf of

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2 **Appendix B.**

the District with Mr. Forman. None of these contracts made any reference to renewal. In December of 1979, Mr. Forman was informed by the Chairman of the Board, Leon Irwin III, that the Board would not enter into a contract with him for the year 1980. [3] Shortly thereafter, Mr. Forman filed this lawsuit.

In his Complaint, petitioner Forman alleged that the failure of the Board to renew his contract for legal services for the year 1980 deprived him of his property without due process of law in violation of the fifth and fourteenth amendments to the United States Constitution, and violated his rights of association and right to support the political candidate of his choice, in violation of the first amendment. The Complaint sought declaratory, injunctive and monetary relief against the Mayor, his Executive Assistant, the District, and the members of the Board. All defendants answered and thereafter filed motions for summary judgment. The district court granted the motions, [4] and the Fifth Circuit Court of Appeals affirmed and denied petitioner's petition for rehearing and suggestion for rehearing *en banc*.

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3 A contract for two months, until February 1, 1980, was subsequently entered into between the Board and Mr. Forman, so that he could complete the projects he was working on and turn them over to this successor.

4 The district court decided the motions for summary judgment on the same grounds as to all defendants. Defendants the city of New Orleans, Ernest N. Morial and Anthony H. Mumphrey filed a memorandum in the district court and a brief in the court of appeals adopting the arguments raised by the other defendants in their district court memorandum and appeals court brief.

Although in his Complaint petitioner Forman claimed a property interest in continued renewals of his contracts with the Board, he has not urged that claim before the district court or in his briefs to the court of appeals or this Court.

REASONS FOR REFUSAL OF THE WRIT OF CERTIORARI

I.

The Holdings of This Court in Branti v. Finkel, *445 U.S. 507, 100 S. Ct. 1287 (1980), and* Elrod v. Burns, *427 U.S. 347, 96 S. Ct. 2673 (1976), Are Inapposite in the Instant Case.*

Both in the district court and in the court of appeals, petitioner Forman has relied almost exclusively upon the holdings of this Court in *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980), and *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976). Because both of those cases addressed sweeping patronage dismissals of public employees by officials in administrations newly assuming power, construing this Court's holdings there as supporting petitioner's position is unwarranted. The constitutional and public policy concerns this Court faced in *Elrod* and in *Branti* simply are not present in this case.

In *Elrod*, this Court faced the dismissal by a newly elected Democratic county sheriff of a sheriff's deputy, a bailiff, a process server, a security guard, and another employee. In *Branti*, likewise, a newly appointed county public defender, a Democrat, dismissed (with one possible exception) all non-Democratic assistants who were in office when he assumed power. In both of those cases, this Court framed the issue before it very narrowly and made clear that its concern was with large-scale patronage dismissals incident to partisan politics. *Branti v. Finkel*, 100 S. Ct. 1287, 1289 (1980); *Elrod v. Burns*, 96 S. Ct. 2673, 2678 (1976).

Almost none of the material facts in those two cases are present in this case. For example, petitioner Forman was not an employee but an independent professional consultant engaged by the Board of Commissioners of the District pursuant

to La. Rev. Stat. 33:2740.3 (F) (1974) to provide legal services. His professional relationship with the Board was governed by a series of contracts, each of which was complied with in all of its terms and none of which made any reference to renewal. This case, therefore, is subject to the familiar rule that a client (in this case a state-created taxing district of the city of New Orleans) remains free at all times to discharge his attorney, with or without cause. *Prophit v. McSween, Brook & Bolten*, 347 So. 2d 11 (La. App. 3d Cir.), *writ refused*, 350 So.2d 902 (La. 1977); *Fiasconaro & Fiasconaro v. Orlando*, 342 So. 2d 1261 (La. App. 4th Cir. 1977); *Pierson v. Department of Revenue*, 316 So. 2d 404 (La. App. 1st Cir.), *writ refused*, 320 So. 2d 912 (La. 1975).

In addition, this case does not involve a political party newly assuming power "throwing out" the appointees of the defeated party. The Morial administration had been in office in New Orleans for nearly three years at the time petitioner Forman was told that his contract for professional services would not be renewed. Neither is partisan politics – the principal concern of this Court in *Elrod* and in *Branti* – an issue in the present case. At all times pertinent to this lawsuit, petitioner Forman, the Mayor, his Executive Assistant and the Chairman of the Board of Commissioners of the District were registered Democrats.

The dissimilarity of the facts [5] of this case to those in *Elrod* and in *Branti* highlight the point that the danger this

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5 The facts as set forth herein are among those presented to the district court in the affidavit of R. Thomas Cucullu, Jr., then Executive Director of the District (Appendix B) and in the statement of uncontested material facts filed by the District and its Commissioners along with their motion for summary judgment, as required by Local Rule 3.9 of the Eastern District of Louisiana.

Under the familiar principles of Fed. R. Civ. P. 56(e), a party opposing a motion for summary judgment may not rest upon the mere

Court addressed in those two cases simply does not exist here. The Board's decision not to renew petitioner Forman's contract for 1980 was not a discharge from a job, and certainly was not a discharge "solely because of . . . partisan political affiliation or nonaffiliation," *Elrod*, 96 S. Ct. at 2678, or "solely because of . . . political beliefs," *Branti*, 100 S. Ct. at 1289. Despite petitioner's complaint that the district court applied a "new test" in this case, it is apparent from a review of the transcript of the hearing on the motions for summary judgment that the district court properly recognized the absence of the single most important element in petitioner Forman's case:

> "You see the problem as I see it. There is really a narrowing down here. The thing that I am worrying about is the situation, all these first amendment cases contemplate some clear-cut Republican, Democrat, the ins and outs, the goods and bads, the liberals and conservatives, and at the very most you [*i. e.*, petitioner Forman] have none of that. At the very most you have more clout, less clout; more friends of the Mayor's and less friends of the Mayor's; more, possibly a phone call from Mr. So-and-So in someone else's behalf than in Mr. Forman's behalf."

Hearing on Motions for Summary Judgment, December 3, 1980 (Petition for Writ of Certiorari, Appendix B-12).

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5 [continued]
allegations of his pleading but must respond setting forth specific facts showing that there is a genuine issue for trial. *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 529 F.2d 289 (8th Cir. 1975), *cert. denied*, 424 U.S. 915, 96 S. Ct. 1116 (1976); *Tunnell v. Wiley*, 514 F.2d 971 (3d Cir. 1975). Petitioner Forman filed no counteraffidavits, and has never contested any of the facts set forth in the Local Rule 3.9 statement or in Mr. Cucullu's affidavit.

What petitioner Forman asks, at bottom, is that this Court hold that the Board is required, as a matter of constitutional law, to grant him indefinitely continuing renewals of his contracts for legal services, when he can point to no first amendment freedom that figured in the decision not to renew his contract. Because the teachings of this Court in *Elrod* and in *Branti* are so clear, the district court and the court of appeals properly dismissed petitioner Forman's claim. [6]

II.

Petitioner Forman's Responsibilities Under His Contracts Except Him From the Protection of the Elrod – Branti *Rule.*

In both *Elrod* and in *Branti*, this Court defined the class of persons who are protected by the rule proscribing patronage dismissals by reference to their job responsibilities. This Court said in *Elrod*:

> "The nature of the responsibilities is critical. Employee supervisors, for example, may have many responsibilities, but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policy making position. In determining whether an employee occupies a policy making position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals."

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6 Petitioner Forman complains on pp. 12-14 of his brief before this Court of the decision in *McCormick v. Edwards*, 646 F.2d 173 (5th Cir. 1981). Because the facts of *McCormick* have next to nothing in common with the facts of this case, whether that case was decided rightly or wrongly has no bearing on whether certiorari in this case should be granted.

96 S. Ct. at 2687. As the affidavit of the former Executive Director of the District [7] makes clear, petitioner Forman certainly acted as an adviser, formulated plans, and had broad and not well-defined responsibilities.

Four years later, in *Branti*, this Court provided needed guidance to the lower courts when it stated that "the ultimate inquiry is not whether the label 'policy maker' or 'confidential' fits a particular position," 100 S. Ct. at 1295. The lesson that the issue is not answered by a mere application of labels is not, in respondents' view, a retreat from the holding in *Elrod*. This Court in *Branti* expressly endorsed the reasoning and holding of *Elrod* several times, *see* 100 S. Ct. at 1292-94, and cited "the broader public responsibilities of an official such as a prosecutor." *Id.* at 1295 n. 13. In every case, *Branti* teaches, the issue can only be decided by a careful examination of the discharged person's job responsibilities.

An examination of that sort in this case establishes that petitioner Forman, as outside legal counsel to the District, had exactly the sort of job responsibilities which except him from the protection of the *Elrod—Branti* rule. As set forth in Mr. Cucullu's affidavit, [8] petitioner Forman drafted by-laws and amendments to the District's enabling legislation, drafted ordinances for submission to the City Council, participated in all meetings of the Board of Commissioners, including closed executive sessions, and drafted and monitored the performance of contracts for the District. Not all jobs are subject to the *Elrod—Branti* proscription against patronage dismissals; petitioner Forman's engagement as outside legal counsel to the District, because of the nature of his responsibilities, was just such a job.

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7 **Appendix B.**

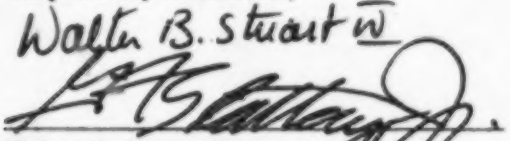
8 **Appendix B.**

The statement by petitioner on page nine of his brief before this Court, that "the question is not merely the nature of the job, but rather whether political affiliation is an appropriate requirement for the effective performance of the public office involved," reveals his confusion of this Court's statement of the issue with the factors it set forth to guide the lower courts in settling that issue as it arises case-by-case. Simply put, "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved," 100 S. Ct. at 1295, is just what this Court said it was: an inquiry. The inquiry is *answered*, this Court has taught in *Elrod* and in *Branti*, by analyzing the nature of the discharged person's job responsibilities. Petitioner Forman's job responsibilities – a matter of no dispute among the parties in this case – are the sort which, applying the principles of *Elrod* and *Branti*, except him from the protection of the rule proscribing patronage dismissals.

CONCLUSION

The grant or denial of a writ of certiorari is a matter of sound judicial discretion. In this case, not only are the constitutional and public policy concerns which this Court faced in *Elrod* and in *Branti* absent, but also the nature of petitioner Forman's job responsibilities are the sort which clearly place him outside the protection of the rule set forth in those two cases. None of the factors in Supreme Court Rule 17(1) being present, therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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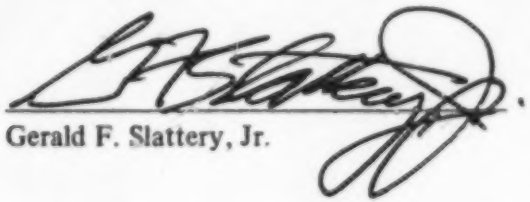
70112

CERTIFICATE OF SERVICE

It is certified that copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were served on petitioner and respondents the city of New Orleans, Ernest N. Morial, and Anthony N. Mumphrey by mailing same to their counsel of record as required by Rule 28 (3) of this Court.

New Orleans, Louisiana, this 20th day of November, 1981.



Gerald F. Slattery, Jr.

APPENDIX A

Title 33, Louisiana Revised Statutes

§2740.3. The Downtown Development District of the city of New Orleans; creation, composition and powers; preparation of plans; levy of ad valorem taxes and issuance of bonds

A. There shall be, and there hereby is, created a special taxing district within the city of New Orleans comprised of all the territory within the following prescribed boundaries:

The point of beginning shall be at the intersection of the east bank of the Mississippi River and the Mississippi River Bridge approaches and Pontchartrain Expressway: thence continuing along the upper line of the Pontchartrain Expressway right-of-way less and except ramp areas, and in a northwesterly direction to the lake side right-of-way line of Claiborne Avenue; thence northeasterly along the lake side of said right-of-way line of Claiborne Avenue to the lower right-of-way line of Iberville Street; thence along the said lower right-of-way line of Iberville Street to the east bank of the Mississippi River; thence continuing along the east bank of said river to the upper right-of-way line of the Mississippi River Bridge approaches and Pontchartrain Expressway, being the point of beginning.

The said special taxing district shall be known as, and is hereby designated The Downtown Development District of the City of New Orleans, hereinafter in this Section referred to as the district, said creation to be effective January 1, 1975.

B. The council of the city of New Orleans, or its successor exercising the legislative powers of said city hereinafter referred to, collectively, as the "city council," shall have such power and control over, and responsibility for, the functions, affairs and administration of the district as are prescribed.

C. In order to provide for the orderly planning, development, acquisition, construction and effectuation of the services, improvements and facilities to be furnished by the district, and to provide

for the representation in the affairs of the district of those persons and interests immediately concerned with and affected by the purposes and development of the district, there is hereby created a board of commissioners for the district hereinafter referred to as the "board".

D. The board shall be composed of nine members at least seven of whom shall be qualified voters of the city of New Orleans, and such members shall possess such additional qualifications and shall be appointed as follows:

(1) All members shall be appointed by the mayor with the approval of the city council, provided, however, that the mayor will select five of such members from a list of eight nominees named by the central area council of the chamber of commerce of the New Orleans area, or its successor.

(2) The members of the board initially appointed shall be appointed as follows: two members for one year each, two members for two years each, two members for three years each, two members for four years each and one member for five years, the length of the term for each individual appointed to be determined by lot. They shall serve until their successors have been appointed and qualified. The members of the board thereafter appointed upon the expiration of the respective terms of the initial appointees shall be selected and appointed in accordance with the procedures herein prescribed for the selection and appointment of the original members for the term of five years. Any vacancy which occurs prior to the expiration of the term for which a member of the board has been appointed shall be filled by appointment in the same manner as the original appointment for the unexpired term.

(3) As soon as practicable after their appointment, the board shall meet and elect from their number a chairman, a vice chairman, a treasurer, and such other officers as it may deem appropriate. A secretary of the board may be selected from among the members or may be otherwise selected or employed by the

board. The duties of the said officers shall be fixed by bylaws adopted by the board. The board shall adopt such rules and regulations as it deems necessary or advisable for conducting its business and affairs, and shall engage such assistants and employees as is needed to assist the board in the performance of its duties. It shall hold regular meetings as shall be provided by its bylaws and may hold special meetings at such time and places within or without the districts as may be prescribed in its rules or regulations. A majority of the members of the board shall constitute a quorum for the transaction of business. The board shall keep minutes of all regular and special meetings and shall make them available to the public in conformance with law. The members of the board shall serve without compensation; however, they shall receive travel allowance as reimbursement for expenses incurred while attending to the business of the district.

E. (1) The board shall prepare, or cause to be prepared, a plan or plans (such plan or plans, and the plan provided for in Subsection F of this Section, being hereinafter referred to, collectively, as the plan) specifying the public improvements, facilities and services proposed to be furnished, constructed or acquired for the district, and it shall conduct such public hearings, publish such notice with respect thereto and disseminate such information as it in the exercise of its sound discretion may deem to be appropriate or advisable and in the public interest.

(2) Any plan may specify and encompass any public services, capital improvements and facilities which the city of New Orleans is authorized to undertake, furnish or provide under the constitution and laws of the state of Louisiana, and such specified public services, improvements and facilities shall be, and shall for all purposes be deemed to be, special and in addition to all services, improvements and facilities which the city of New Orleans is then furnishing or providing, or may then, or in the future, be obligated to furnish or provide with respect to persons or property within the boundaries of the district.

(3) Any plan shall include (a) an estimate of the annual and aggregate cost of acquiring, constructing or providing the services, improvements or facilities set forth therein; (b) the proportion of the tax to be levied on the taxable real property within the district which is to be set aside and dedicated to paying the cost of furnishing specified services, and the proportion of such tax to be set aside and dedicated to paying the cost of capital improvements, or paying the cost of debt service on any bonds to be issued to pay the cost of capital improvements, such proportions, in each case, to be expressed in numbers of mills; and (c) an estimate of the aggregate number of mills required to be levied in each year on the taxable real property within the district in order to provide the funds required for the implementation or effectuation of the plan for furnishing the services specified and for capital improvements or debt service, or both.

(4) The board shall also submit the plan to the planning commission of the city of New Orleans. Said planning commission shall review and consider the plan in order to determine whether or not it is consistent with the comprehensive plan for the city of New Orleans, and shall within thirty days following receipt thereof submit to the city council its written opinion as to whether or not the plan or any portion or detail thereof is inconsistent with the comprehensive plan for the city, together with its written comments and recommendations with respect thereto.

(5) After receipt of the plan together with the written comments and recommendations of the city planning commission, the city council shall review and consider the plan, together with such written comments and recommendations. The city council may by a majority vote of its members adopt or reject the plan as originally submitted by the board, or it may alter or modify the plan or any portion or detail thereof, but only by a majority vote of all of its members. If the plan as originally submitted by the board is adopted by the majority vote of the city council, it shall become final and conclusive and may thereafter be implemented. If, however, the city council alters or modifies the plan by a

majority vote of its members, the plan as so altered or modified shall be resubmitted to the board for its concurrence or rejection. The board may concur in such modified plan by a majority vote of all of its members. If the board so votes to concur in the plan as modified by the city council, the plan shall become final and conclusive and may thereafter be implemented. If, however, the board does not concur in the plan as modified by the city council, it shall notify the city council in writing of its action. Thereafter, and as often and at such time or times as the board may deem to be necessary or advisable, it shall prepare, or cause to be prepared, a plan or plans and submit the same to the city planning commission in accordance with the same procedure hereinabove prescribed with respect to the original plan. The city planning commission shall, in turn, submit such plan, together with their written comments and recommendations, to the city council for its adoption, modification or rejection in the same manner and with the same effect as hereinabove provided with respect to the original plan.

F. The provisions of Subsection E of this Section to the contrary notwithstanding, the board may prepare and submit directly to the city council a plan or plans setting forth its intention to employ professional consultants and experts and such other advisors and personnel as it in its discretion shall deem to be necessary or convenient to assist it in the preparation of a plan or plans for the orderly and efficient development of services and improvements within the district. Such plan shall also specify the services proposed to be rendered by such employees, an estimate of the aggregate of the proposed salaries of such employees and an estimate of the other expenses of the board required for the preparation of such plan or plans, together with a request that a tax, within the limits hereinafter in this Section prescribed, in an amount sufficient to cover the costs of such salaries and expenses be levied on the real property within the district. The city council shall review and consider such plan within thirty days following the submission to it by the board, and shall adopt or reject such plan by a majority vote of its members. If the city council adopts

such a plan, it shall become final and conclusive and the tax shall be levied as hereinafter provided. If the city council rejects the plan, it shall notify the board of its action, and the board may again and from time to time prepare and submit to the city council for its review, consideration, adoption or rejection in accordance with the procedures provided for in this Paragraph, a plan setting forth the matters hereinabove in this Section prescribed.

G. If no plan is finally and conclusively adopted in accordance with the procedures prescribed in this Section within ten years from and after January 1, 1975, all power and authority conferred hereby shall lapse, the district shall be dissolved and all power and authority incident thereto shall become null and void as a matter of law; provided that, in such event, all obligations, contractual or otherwise, incurred by the district during its existence shall survive and shall be fully enforceable in accordance with their terms.

H. All services to be furnished within the district pursuant to any plan finally and conclusively adopted hereunder, shall be furnished, supplied and administered by the city of New Orleans through its regularly constituted departments, agencies, boards, commissions and instrumentalities as appropriate in the circumstances; and all capital improvements and facilities to be acquired, constructed or provided within the district, whether from the proceeds of bonds or otherwise, shall likewise be so acquired, constructed or provided by the city of New Orleans through its regularly constituted departments, agencies, boards, commissions and instrumentalities as appropriate in the circumstances, it being the intention hereof to avoid absolutely the duplication of administrative and management efforts and expense in the implementation of any plan adopted for the benefit of the district. In order to provide such services and/or provide, construct or acquire such capital improvements or facilities the board may enter into contracts with the city of New Orleans. The cost of any such services, capital improvements and facilities shall be paid for to the city of New Orleans from the proceeds of the special tax levied upon real property within the district as herein provided, or from

the proceeds of bonds, as the case may be.

I. The city council, in addition to all other taxes which it is now or hereafter may be authorized by law to levy and collect, is hereby authorized to levy and collect as hereinafter specifically provided for a term not to exceed fifty years from and after the date the first tax is levied pursuant to the provisions of this Section, in the same manner and at the same time as all other ad valorem taxes on property subject to taxation by the city are levied and collected, a special ad valorem tax upon all taxable real property situated within the boundaries of the core area development district. The number of mills hereby authorized shall be computed by dividing the number of mills levied and collected by the city of New Orleans for general operating purposes for the year 1977 into the number of mills levied and collected by the city of New Orleans for general operating purposes for the year 1978 and multiplying the result by ten. No such tax shall be levied until a plan requiring or requesting the levy of a tax is finally and conclusively adopted in accordance with the procedures prescribed in this Section. The proceeds of said tax shall be used solely and exclusively for the purposes and benefit of the district. Said proceeds shall be paid over to the Board of Liquidation, City Debt, day by day as the same are collected and received by the appropriate officials of the city of New Orleans and maintained in a separate account. Said tax proceeds shall be paid out by the Board of Liquidation, City Debt, solely for the purposes herein provided upon warrants or drafts drawn on said Board of Liquidation, City Debt, by the appropriate officials of the city and the treasurer of the district.

J. (1) The city of New Orleans, when requested by resolution adopted by the vote of a majority of the members of the board, approved by a resolution of the city council adopted by a majority vote of its members, and by resolution adopted by the vote of a majority of the members of the Board of Liquidation, City Debt, shall have power and is hereby authorized to incur indebtedness for and on behalf and for the sole and exclusive

benefit of the district, and to issue at one time, or from time to time, negotiable bonds, notes and other evidences of indebtedness herein referred to collectively as bonds of the city of New Orleans, the principal of, premium if any, and interest on which shall be payable solely from the proceeds of the special tax authorized, levied and collected pursuant to the provisions of this section for the purpose of paying the cost of acquiring and constructing capital improvements and facilities within the district. Such bonds shall not constitute general obligations of the city of New Orleans, nor shall any property situated within the city other than property situated within the boundaries of the district be subject to taxation for the payment of the principal of, premium, if any, and interest on such bonds. Furthermore, any indebtedness incurred by the city of New Orleans for and on behalf and for the benefit of the district pursuant to the provisions of this Section, whether evidenced by bonds, notes or other evidences of indebtedness, or otherwise, shall be excluded in determining the power of the city of New Orleans to incur indebtedness and to issue its general obligation bonds. The principal amount of such bonds which may be outstanding and unpaid at any one time shall never exceed the sum of fifty million (50,000,000) dollars. The proceeds derived from the sale of all such bonds shall be paid over to the appropriate officials of the city of New Orleans and shall be disbursed solely for the purposes and benefit of the district. All such bonds shall be sold by the Board of Liquidation, City Debt, and shall bear such rate or rates of interest, and shall, except as herein otherwise specifically provided, be in such form, terms and denominations, be redeemable at such time or times at such price of or prices, and payable at such times and places, within a period of not exceeding fifty years from the date thereof, as the Board of Liquidation, City Debt, shall determine.

(2) Said bonds shall be signed by the mayor of the city of New Orleans and the director of finance of the city of New Orleans, or officers exercising a similar function, and countersigned by the president or vice president and the secretary or assistant secretary of the Board of Liquidation, City Debt,

provided that in the discretion of the Board of Liquidation, City Debt, all but one of said signatures may be in facsimile, and the coupons attached to said bonds shall bear the facsimile signatures of said director of finance and said secretary or assistant secretary. In case any such officer whose signature or countersignature appears upon such a bond or coupon shall cease to be such officer before delivery of said bonds or coupons to the purchaser, such signature or countersignature shall nevertheless be valid for all purposes. The cost and expense of preparing and selling said bonds shall be paid from the proceeds thereof.

(3) The resolution of the Board of Liquidation, City Debt, authorizing the issuance and sale of such bonds and fixing the form and details thereof, may contain such other provisions, not inconsistent nor in conflict with the provisions of this Section, as it may deem to be necessary or advisable to enhance the marketability and acceptability thereof by purchasers and investors, including, but without limiting the generality of the foregoing, covenants with bondholders setting forth (a) conditions and limitations on the issuance of additional bonds constituting a lien and charge on the special tax levied on real property within the district pari passu with bonds theretofore issued and outstanding and (b) the creation of reserves for the payment of the principal of and interest on such bonds. These bonds and the interest thereon are exempt from all taxation levied for state, parish or municipal or other local purposes; and savings banks, tutors of minors, curators of interdicts, trustees and other fiduciaries are authorized to invest the funds in their hands in said bonds.

(4) The Board of Liquidation, City Debt, as now organized and created, and with the powers, duties and functions prescribed by existing laws, shall be continued so long as any bonds authorized by this Section are outstanding and unpaid.

K. Notwithstanding any other provision of this Section to the contrary, no tax authorized herein shall be levied and no bonds shall be issued unless and until the maximum amount of the tax

and the maximum amount of the bonds has been approved by a majority of the electors voting thereon in the city of New Orleans in an election called for that purpose. No bonds issued pursuant to this Section shall be general obligations of the state of Louisiana, the parish of Orleans or the city of New Orleans.

L. The district shall have the power to acquire, to lease, to insure and to sell real property within its boundaries in accordance with its plans.

M. The district shall have the power to advance to the city of New Orleans funds for payment for services rendered by the city pursuant to a contract or contracts between the district and the city.

Added by Acts 1974, No. 498, §1. Amended by Acts 1977, No. 124, §1; Acts 1978, No. 307, §1, eff. July 10, 1978.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 80-1654
SECTION "M" (2)

WILLIAM H. FORMAN, JR.

VERSUS

CITY OF NEW ORLEANS, ERNEST N. MORIAL, individually and in his capacity as Mayor of the City of New Orleans; ANTHONY MUMPHREY, individually and in his capacity as Executive Assistant to the Mayor of the City of New Orleans; the Downtown Development District; and LEON IRWIN III, DR. ALMA H. YOUNG, ROBERT G. MORGAN, JOSEPH C. CANIZARO, LAURENCE EUSTIS, JR., LEON GODCHAUX, III, AUTHUR L. JUNG, III and WARREN G. MOSES in their capacities as commissioners of the Downtown Development District

AFFIDAVIT

BEFORE ME, the undersigned Notary in and for the Parish of Orleans, State of Louisiana, personally came and appeared:

R. THOMAS CUCULLU, JR.,

who, being first duly sworn by me upon his oath, did depose and say:

I.

He is the Executive Director of the Downtown Development District.

II.

At all times pertinent to this lawsuit, he served in the above-mentioned capacity, or as Assistant Executive Director, for the Downtown Development District or its predecessor, the Core Area Development District.

III.

In that capacity, he is personally familiar with and competent to testify to the details of the services provided by William H. Forman, Jr. as an independent professional consultant to the Downtown Development District.

IV.

Plaintiff Forman, as a matter of customary practice, attended and participated in closed-door Executive Sessions of the Board of Commissioners of the Downtown Development District.

V.

Plaintiff Forman, as a matter of customary practice, attended and participated in regular meetings of the Board of Commissioners of the Downtown Development District. All the business of the Downtown Development District is carried out, and all of the Board's decisions are made, in the Executive Sessions and regular meetings.

VI.

As part of the professional services rendered to the Downtown Development District for which he was paid a fee, plaintiff

Forman:

A. Drafted bylaws of the Downtown Development District, and their amendments;

B. Drafted amendments to the enabling legislation of the Downtown Development District, La. Rev. Stat. 33:2740.3;

C. Drafted contracts and amendments to contracts of the Downtown Development District;

D. Drafted ordinances proposed to and adopted by the Board of Commissioners of the Downtown Development District, and in turn presented to the City Council of New Orleans for adoption, among which were the following:

1. Regulations of "flop houses" in the Central Business District;

2. Establishment of the Historic Marker Program;

3. Amendment of relevant provisions of the Building Code of New Orleans;

4. Establishment of surface level parking programs, and pertinent regulations; and

5. Regulation of the sale of ethnic artifacts.

VII.

Plaintiff Forman played an integral part in the drafting of the annual plans of the Downtown Development District for the provision of services and capital improvements to the Central Business District.

VIII.

Attached hereto as Exhibits to this Affidavit are true and correct copies of representative samples of the work performed by plaintiff Forman in his capacity as an independent professional consultant to the Downtown Development District:

1. May 12, 1977 memorandum containing recommendation for regulation of newspaper vending;

2. June 30, 1977 letter containing recommendations regarding a proposed Historical Marker Program for the Downtown Development District;

3. August 11, 1977 draft of ordinance authorizing the City Council to levy a special ten year *ad valorem* tax on commercial and real property in the Core Area Development District for the exclusive use and benefit of the District;

4. November 9, 1977 memorandum containing legal recommendations regarding proposed changes in a Core Area Development District contract;

5. *(In Globo)* January 18, 1978 proposal for a Historic Marker Program in the Core Area Development District;

6. March 16, 1978 memorandum containing recommendations regarding garbage space requirements in new buildings in the Downtown Development District;

7. April 11, 1979 proposed ordinance to regulate newspaper vending in the Downtown Development District.

/s/ R. Thomas Cucullu, Jr.
R. Thomas Cucullu, Jr.
Executive Director
Downtown Development District of
City of New Orleans

Sworn to and subscribed before me,
this 4th day of November, 1980.

/s/ Stephen I. Dwyer
NOTARY PUBLIC